UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN PLUMLEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-140-P-C***
	)	
SOUTHERN CONTAINER, INC.,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO STRIKE AND RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Both the plaintiff and the defendant have filed motions for summary judgment in this action alleging breach of contract and violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*., and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 180 *et seq*. I deny the motion to strike and recommend that the court deny the plaintiff's motion for summary judgment and grant the defendant's motion for summary judgment.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56

F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.[1]

At all pertinent times, the defendant operated a manufacturing plant located in Westbrook, Maine. Defendant's Statement of Material Facts ("Defendant's SMF") (Docket No. 28) ¶ 1. At all pertinent times, manufacturing employees at this plant were represented for purposes of collective bargaining by Local 669 of the United Paperworkers International Union, AFL-CIO ("the Union"), and a collective bargaining agreement was in effect. *Id*. ¶¶ 2-3. The plaintiff was first employed by the defendant at its Westbrook plant on or about February 14, 1996. *Id*. ¶ 4. During the course of his employment at the plant, the plaintiff filed seven grievances. *Id*. ¶ 5.

The defendant discharged the plaintiff on or about March 21, 1998, whereupon the plaintiff filed a grievance which eventually progressed to arbitration. *Id*. ¶¶ 6-8. An arbitration award reduced the plaintiff's discharge to a two-week suspension without pay. *Id*. ¶ 10. Leo Parenteau, the plant manager, became aware of the award on or about October 5, 1998 and on October 6, 1998 sent the plaintiff a registered letter directing him to report for work on October 12, 1998. *Id*. ¶¶ 11-12. The plaintiff was eventually paid back wages pursuant to the arbitration award. Statement of

[1] The plaintiff has filed no opposing statement of material facts in response to the statement of material facts filed by the defendant with its motion for summary judgment as required by this court's Local Rule 56(c). As a result, all of the assertions in the defendant's statement of material facts, to the extent that they are supported by appropriate citations to the summary judgment record, are deemed admitted. Local Rule 56(e). The same is true of the entries in the statement of additional material facts filed by the defendant in opposition to the plaintiff's motion for summary judgment. The plaintiff's failure to respond to that document as required by Local Rule 56(d) means that those facts are also deemed admitted to the extent that they are appropriately supported. In addition, the plaintiff has filed a document entitled "Plaintiff's Supplemental Statement of Material Facts re Motion for Summary Judgment" with his reply brief in support of his motion, Docket No. 46, and the defendant has filed a "Reply Statement of Material Facts" that is included in its response to the plaintiff's additional statement of material facts, Docket No. 50. Local Rule 56 does not allow a party to submit additional facts with a reply brief, and neither party sought leave of court to do so. The court will disregard these documents.

Material Facts re Motion for Summary Judgment ("Plaintiff's Additional SMF") (Docket No. 41) ¶ 8; Defendant's Reply to Plaintiff's Opposing Statement of Material Facts ("Defendant's Response to Plaintiff's Additional SMF") (Docket No. 50) ¶ 8. During the twelve months preceding the plaintiff's recall to work on October 12, 1998 he had actually worked 851.25 hours for the defendant. Defendant's SMF ¶ 13.

The plaintiff had started a small business with three friends in 1998. Statement of Material Facts re Motion for Summary Judgment ("Plaintiff's SMF") (Docket No. 32) ¶ 6; Defendant's Response to Plaintiff's Statement of Material Facts ("Defendant's Responsive SMF") (Docket No. 38) ¶ 6. They opened a club with live music. *Id*. Later the plaintiff became primarily responsible for operating the club and scheduling coverage. *Id*. After his 1998 termination the plaintiff worked full time at the club. *Id*. ¶ 7. He worked full-time at the club from July 4, 1998 until it closed on December 30, 2000. Defendant's SMF ¶ 15. He received Parenteau's letter on October 7, 1998 and was unhappy with the return-to-work date of October 12 because it only gave him two business days to sort out coverage for the following week at the club. Plaintiff's SMF ¶ 7; Defendant's Responsive SMF ¶ 7. He met with Parenteau on October 8 and requested a few days' delay in his return to work; this request was denied. *Id*. The plaintiff reported to the plant on October 12, 1998 but worked only two hours out of his eight-hour shift in order to attend to his business at the club. Defendant's SMF ¶ 18.

The plaintiff did not report to work the next day. *Id*. ¶ 19. He called in to the plant and left a message that he would be late for his shift and might not be in at all. Plaintiff's SMF ¶ 10; Defendant's Responsive SMF ¶ 10. Specifically, the plaintiff testified that he remembered saying

> [T]here's problems with my dad. I'm going to see him. I'm going to try to make it back to work. I'll be late, but I'm going to try to make it back and work.

Defendant's SMF ¶ 34; Deposition of John M. Plumley ("Plaintiff's Dep.") at 59. The plaintiff's father had been hospitalized in Boston from October 4, 1998 up to and including October 14, 1998. Defendant's SMF ¶ 29. The plaintiff visited his father in the hospital on October 13, 1998. *Id*. ¶¶ 31-32. When the plaintiff arrived at the plant the following day he was told to see Parenteau, who fired him after a brief discussion. Plaintiff's SMF ¶ 11; Defendant's Responsive SMF ¶ 11. Parenteau told the plaintiff that he was being fired for job abandonment. Defendant's SMF ¶ 20. In response, the plaintiff told Parenteau "something along the lines of, well, looks like we're going to have to grieve this one also." *Id*. ¶ 22.

The plaintiff invoked the Union grievance process and a grievance was filed on his behalf by the shop steward on or about October 15, 1998. Plaintiff's SMF ¶ 12, Defendant's Responsive SMF ¶ 12; Defendant's SMF ¶ 23. The written grievance stated, *inter alia*, that the plaintiff was "not given enough time to get his biss [sic] in order." Defendant's SMF ¶ 23. The company denied the grievance and the Union did not submit the grievance to arbitration. Defendant's SMF ¶¶ 24-25. Local 669 abandoned that grievance and several others. Plaintiff's SMF ¶ 13; Defendant's Responsive SMF ¶ 13. The plaintiff was repeatedly told by Union personnel that the Union was working on his grievance and later was told that the paperwork had been lost. Plaintiff's Additional SMF¶ 17; Defendant's Response to Plaintiff's Additional SMF ¶ 17.[2] The plaintiff learned in November 1999 that the grievance "had never been followed up with the necessary request for arbitration in the time limits allowed." *Id*. ¶ 18. A Mr. Lestage, whose position with the defendant or the Union is not specified by the plaintiff, told the plaintiff on November 11, 1999 that the Union would not take the case to arbitration because the required notice to arbitrate had not been given. *Id*. ¶¶ 18-19.

[2] The defendant's response to this paragraph of the plaintiff's additional statement of material facts purports to deny it, but the denial does not address the portions of the paragraph recited above and, in any event, cites only to a nonexistent paragraph of the affidavit of Michael Landry (Docket No. 33). Because the plaintiff's supplemental affidavit (Docket No. 40) does support the recited material, it (*continued on next page*)

The applicable collective bargaining agreement contains a three-step grievance and arbitration procedure which requires grievances to be presented within five days after occurrence. Defendant's SMF ¶ 35. If the company response to the grievance is unsatisfactory, the grievance must be presented in writing. *Id*. If the grievance remains unresolved after completion of Step II of the grievance procedure, either party may serve a request for arbitration within five days of the company's answer in Step II. *Id*.

III. Discussion

A. Motion to Strike

The plaintiff asks this court to strike six of the defendant's denials of the statement of material facts that he submitted in support of his motion for summary judgment and nine of the paragraphs included in the separate statement of material facts submitted by the defendant in opposition to his motion, all of which are found in Docket No. 38. Plaintiff's Motion to Strike ("Strike Motion") (Docket No. 48). The motion seeks to strike these paragraphs either on the grounds that particular paragraphs are not supported by the proffered citations to the record, that they are irrelevant, that they are supported only by citations to evidence that is inadmissible or that they are supported only by citation to the Parenteau deposition, which the plaintiff contends may not be used to support a motion for summary judgment.[3]

The motion to strike was filed on August 10, 2001. Docket. Most of the grounds stated with respect to each specific paragraph the plaintiff requests the court to strike may fairly be characterized as denials or qualifications of the subject matter of those paragraphs. Such responses should have been made in the reply statement of material facts required by this court's Local Rule 56(d) rather than

must be deemed admitted under these circumstances.

[3] Curiously, the plaintiff does not include in his motion paragraphs 1, 10-12 and 26-28 of the statement of material facts submitted by the defendant in support of its motion for summary judgment (Docket No. 28), each of which is supported solely by a citation to the (*continued on next page*)

in a separate motion to strike. The plaintiff's failure to file such a response means that the additional facts included in Docket No. 38 are deemed admitted, to the extent that they are supported by the citations given to the summary judgment record, by operation of Local Rule 56(f), and the plaintiff cannot be allowed to circumvent this rule by filing a separate motion to strike. The plaintiff's motion to strike nine of the paragraphs in the defendant's separate statement of material facts should therefore be disregarded.

Even if that were not the case, the motion fails on its merits. As the basis for his motion with respect to paragraphs 3, 10 and 11 of the defendant's denials of his statement of material facts and all nine paragraphs of the defendant's additional statement of material facts, the plaintiff contends that the defendant may not rely on the corporate deposition given by Parenteau because Fed. R. Civ. P. 32 allows the use of depositions only by a party adverse to the corporate deponent. Strike Motion at 7-8. The plaintiff's position is simply incorrect.

Rule 32(a)(2) simply provides that a deposition taken pursuant to Rule 30(b)(6) *may* be used at trial by an adverse party "for any purpose." Rule 56(c) allows the use of "pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, it any" to support a motion for summary judgment. The plaintiff's position is that a party seeking summary judgment must provide by affidavit the same evidence already given under oath at deposition. That empty and duplicative step is not required by the rules at issue. While my research has located no reported case law dealing with this question in the specific context of Rule 32(a)(2), case law dealing with the language of Rule 32(a) to the effect that a deposition may be used at trial against any party who was present or represented at the taking of the deposition holds that the use of such deposition testimony in support of a motion for

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Parenteau deposition.

summary judgment is not proscribed.[4] *See, e.g.*, *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 967 (9th Cir. 1981); *SEC v. Antar*, 120 F.Supp.2d 431, 445-46 (D. N.J. 2000). This holding is consistent with the Supreme Court's discussion of an argument that a motion for summary judgment could not be granted in the absence of supporting affidavits:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule . . . ."

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is also consistent with the analysis of the leading commentators on the rules of civil procedure.

> Rule 32(a) governs the use of a deposition at the trial or upon the hearing of a motion or an interlocutory proceeding. In addition Rule 56(c) specifically allows depositions to be considered on a motion for summary judgment. Indeed depositions can be used more freely on motions than the rule would seem to indicate. A deposition is at least as good as an affidavit and should be usable whenever an affidavit would be permissible, even though the conditions of the rule on use of a deposition at trial are not satisfied.

8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* §2142 at 164 (2d ed. 1994). The defendant may rely on Parenteau's deposition testimony in support of its motion for summary judgment.

With respect to the remaining denials challenged by the plaintiff, paragraphs 9, 15 and 16, while I note that the defendant's denial of paragraph 9 is non-responsive, none of the specific factual points contested by the plaintiff is material to resolution of the motions for summary judgment. It is not necessary to consider further the reasons advanced by the plaintiff for striking those assertions.

[4] The sole case cited by the plaintiff in support of his assertion that "[t]here appears to be a split in authority on this point," Plaintiff's Reply Memorandum (Docket No. 53) at 2, *Taylor v. Rederi A/S Volo*, 249 F. Supp. 326, 328 (E.D. Pa. 1966), was overturned on appeal, with the Third Circuit specifically declining to rule on this question, *Taylor v. Rederi A/S Volo*, 374 F.2d 545, 549 (3d Cir. (*continued on next page*)

The plaintiff's motion to strike is denied.

B. The Motions for Summary Judgment

1. Count II (Breach of Contract). The defendant contends that the plaintiff's claim in Count II that the defendant breached the collective bargaining agreement, Plaintiff's Revised Second Amended Complaint (Docket No. 20) ¶¶ 13-15, is pre-empted by the LMRA, which is the basis for Count I of the revised second amended complaint, Defendant's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 27) at 7-9. The plaintiff does not respond to this portion of the defendant's motion and does not mention Count II in his own motion.

Under this court's local rules, a party who fails to file a timely objection to a motion, or an identifiably separate part of a motion, is deemed to have waived objection to the motion or that part of the motion. Because the instant motion is one for summary judgment, however, the court's approach must be somewhat different.

> It is well-established law in this district . . . that Federal Rule of Civil Procedure 56 requires the Court to examine the merits of a motion for summary judgment even though a nonmoving party fails to object as required by Local Rule [7(b)].

FDIC v. Bandon Assoc., 780 F. Supp. 60, 62 (D. Me. 1991).

Section 301 of the LMRA, 29 U.S.C. § 185, pre-empts a state-law claim "wherever a court, in passing upon the asserted state-law claim, would be required to interpret a plausibly disputed provision of a collective bargaining agreement." *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir. 1997). Here, the only contract alleged to have been breached is a collective bargaining agreement. Plaintiff's Revised Second Amended Complaint ¶¶ 4, 14. The only way in which a court could determine whether that contract had been breached by the defendant would be to interpret one or more provisions of it. Since the resolution of Count II would necessitate "analysis of, or substantially

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1967).

depend[] on the meaning of, a collective bargaining agreement," the claim is pre-empted, *Quesnel v. Prudential Ins. Co.*, 66 F.3d 8, 10 (1st Cir. 1995), and the defendant is entitled to summary judgment on this count.

2. Count III — FMLA. The defendant contends that the plaintiff has not presented evidence to establish that he was an "eligible employee" entitled to invoke the protections of the FMLA, that he took leave on October 13, 1998 to care for his ill father or that he provided the defendant with sufficient notice of his intent to take FMLA leave. Defendant's Motion at 2-7.

> In order to establish a *prima facie* case for a FMLA violation, a plaintiff must show that (1) he is protected under the Act; (2) he suffered an adverse employment decision; and (3) either he was treated less favorably than an employee who had not requested FMLA leave or the adverse decision was made because of his request for leave.

Watkins v. J & S Oil Co., 164 F.3d 55, 59 (1st Cir. 1998). The defendant challenges the plaintiff's ability to establish the first element of this test.

The statute provides that

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
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> * * *
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> **(C)** In order to care for the spouse, or son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

29 U.S.C. § 2612(a)(1). An "eligible employee" is defined as

> an employee who has been employed —
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> **(i)** for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
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> **(ii)** for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A). Finally, "[f]or purposes of determining whether an employee meets the hours of service requirement . . . the legal standards established under section 207 of this title shall apply." 29 U.S.C. § 2611(2)(C). Under that section of the Fair Labor Standards Act ("FLSA"), an employee's

"regular rate" is defined to exclude "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . . and other similar payments to an employee which are not made as compensation for his hours of employment." 29 U.S.C. § 207(e)(2).

The plaintiff actually worked only 851.25 hours for the defendant in the twelve months before he claims entitlement to FMLA protection.[5] Therefore, the defendant asserts, he is not an eligible employee under the Act. Defendant's Motion at 3. The plaintiff contends that the hours for which the arbitrator awarded him back pay must be added to this figure, generating a total in excess of 1,250 hours. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") (Docket No. 30) at 6-7. The period after the plaintiff's first termination and before the arbitration award was within the

[5] Defendant's SMF ¶ 13. The plaintiff submitted no denial of this assertion in the form required by Local Rule 56; inasmuch as it is properly supported, it is deemed admitted. The plaintiff nonetheless attacks the affidavit of Leo Parenteau ("Affidavit in Support of Defendant's Motion for Summary Judgment," Docket No. 29)("Parenteau Aff.") cited by the defendant in support of this paragraph in its memorandum of law in opposition to the defendant's motion. Plaintiff's Opposition to Summary Judgment ("Plaintiff's Opposition") (Docket No. 39) at 10 n.6. The defendant contends that, because Parenteau testified at his deposition that he did not know how many hours the plaintiff had actually worked in the twelve months preceding October 13, 1998, his affidavit stating that figure constitutes impeachment of his own testimony and must be disregarded. *Id*. To the contrary, nothing in Parenteau's affidavit contradicts his deposition testimony, in which he merely said that he could not give the actual number until he consulted the records and calculated the number himself. Deposition of John Parenteau ("Parenteau Dep.") at 10-11. Parenteau's affidavit makes clear that he subsequently did so. Parenteau Aff. ¶ 17. A party may not create its own issue of fact by an affidavit contradicting prior deposition testimony, but it is "not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel," *Messick v. Horizon Indus., Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995), and that is all that has happened here.

twelve months immediately preceding October 13, 1998. In the alternative, the plaintiff argues, the defendant is estopped to rely on a figure that does not include the hours that the plaintiff would have worked had he not been terminated by the defendant, a termination that was overturned by the arbitrator.[6] *Id*. at 7.

"[A]ccording to the clear language of the FLSA and its regulations, neither paid leave nor unpaid leave are included in any calculation of 'hours of service' under the FMLA." *Robbins v. Bureau of Nat'l Affairs, Inc.*, 896 F. Supp. 18, 21 (D. D.C. 1995). *See also Nelson v. City of Cranston*, 116 F.Supp.2d 260, 266 (D. R.I. 2000) (hours of service under FMLA include only hours actually worked); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 88 F.Supp.2d 199, 205 (S.D. N.Y. 2000) ("hours worked" does not include time paid, only time actually spent working).

The plaintiff cites 29 C.F.R. § 825.110(b) in support of his position. Plaintiff's Motion at 7. However, that regulation deals only with the calculation of the twelve months of employment required by 29 U.S.C. § 2611(2)(A)(i). The issue at hand concerns the application of 29 U.S.C. § 2611(2)(A)(ii). That calculation is addressed by 29 C.F.R. § 825.110(c), which adopts the principles of the FLSA, refers to the regulations implementing those principles, and speaks in terms of "actual hours worked." The parties cite no case law precisely on point, and my research has located none. However, the fact remains that the plaintiff did not actually work more than 851.25 hours for the defendant in the twelve months immediately preceding October 13, 1998. Under any reasonable application of the FLSA definitions and case law, that means that he is not eligible for FMLA protection, even though he may have been paid, at the arbitrator's behest, for 400 or more additional hours when he did not actually work.

[6] This issue was raised, but not resolved, in *Thoele v. United States Postal Serv*., 996 F. Supp. 818, 821-22 (N.D. Ill. 1998).

The parties offer little authority that is helpful in addressing the plaintiff's estoppel claim. The manner in which the plaintiff presents his argument provides it with a certain initial appeal — the defendant should not be able to avoid its FMLA obligations as a result of conduct found to be wrongful by an arbitrator. The only reported decisions in which estoppel is addressed in connection with the FMLA deal with a specific regulation, 29 C.F.R. § 825.110(d), which provides that, when an employee requests FMLA leave in advance and the employer fails to inform the employee that he or she is ineligible for such leave, the employee will be deemed eligible even though he or she has not worked for the employer the requisite 1,250 hours within the previous 12-month period. Most of the courts that have addressed estoppel claims based on this regulation have held that the regulation is invalid. *E.g., Brungart v. Bellsouth Telecomms., Inc.*, 231 F.3d 791, 795-96 (11th Cir. 2000); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000); *Scheidecker v. Arvig Enters., Inc.*, 122 F.Supp.2d 1031, 1045 (D. Minn. 2000) (citing cases). Those courts that discuss in *dicta* the possibility that the doctrine of estoppel may be applicable to an FMLA claim do so in terms of an employee's reliance on a misleading statement or silence by the employer. *E.g., Dormeyer*, 223 F.2d at 582. Here, the plaintiff has not presented any facts that might allow the drawing of a reasonable inference that he was misled in any way by the defendant's actions. *See generally LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 510 (1st Cir. 1998). Accordingly, to the extent that the plaintiff means to invoke the doctrine of equitable estoppel, his claim must fail.

If the plaintiff means instead to invoke the doctrine of collateral estoppel, in essence contending that the arbitrator's findings bind the employer in the FMLA context, a closer question is presented. Before reaching that question, however, it is necessary to address the defendant's contention that the plaintiff has waived any collateral estoppel argument by raising it only in a perfunctory manner. Defendant's Supplemental Memorandum of Law (Docket No. 55) at 4-5. The

plaintiff's only specific mentions of collateral estoppel appears in his memorandum submitted in reply to the defendant's opposition to his motion for summary judgment. Ordinarily, when a party first raises an issue or argument in a reply memorandum, the court will not consider it. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). In this case, however, I determined that it is possible to conclude that the plaintiff's general references to estoppel in both his motion for summary judgment and his opposition to the defendant's motion included both equitable and collateral estoppel and ordered the defendant to brief the collateral estoppel issue. Order (Docket No. 54). Accordingly, the issue is before the court at this point.

In full, the plaintiff discusses collateral estoppel as follows:

> However, under the [FMLA the defendant] is barred by the collateral estoppel effect of the arbitrator's decision reinstating Mr. Plumley with all seniority and "without loss of pay." Southern reinstated him and paid him wages for that time, precluding it from now claiming that he was not entitled to credit for those wages under the FMLA and, in turn, the FMLA as [sic] hours worked because they were hours paid under the terms of the union contract (Article X) as ordered by the arbitrator in his decision of September 25, 1998.
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> * * *
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> Numerous courts have stated that estoppel may apply to FMLA cases. See, e.g., *Kosakow v. New Rochelle Radiology Assocs.*, 88 F.Supp.2d 199, 209 (S.D. N.Y. 2000). Here Southern is collaterally estopped by the effect of the arbitrator's ruling that Mr. Plumley was to be reinstated as an employee with no adverse effects other than a two week suspension.[7]

Plaintiff's Reply Memorandum re Summary Judgment (Docket No. 47) at 2 & n.2 The argument fails to suggest why the doctrine of collateral estoppel is applicable under the circumstances and cites no specific section of the FMLA that bars the defendant from arguing that the plaintiff is not eligible for

[7] The arbitrator did not in fact rule that the plaintiff was to be reinstated "with no adverse effects" other than the suspension. The award specifically orders the defendant to "reinstate Plumley to his former position without loss of seniority and without loss of pay except for the period of his suspension, all as set forth above," and states above that order that "Plumley should be reinstated with backpay (less the two-week suspension, interim earnings and unemployment benefits, if any), full benefits and seniority." Opinion and Award, In the Matter of Arbitration Between Southern Container, Inc. and United Paperworkers' International Union . . . Grievance: John Plumley Discharge, attached to Plaintiff's Dep. as Exh. 7, at 7. Possible "adverse effects" are not mentioned in the opinion and award.

FMLA coverage. This is a minimal presentation, barely sufficient to avoid application of the doctrine of waiver. The only case law cited by the plaintiff in support of his argument is a single federal district court opinion that declines to address a plaintiff's claim of estoppel based on an employer's alleged failure to post notices about FMLA eligibility required by federal regulation. *Kosakow*, 88 F.Supp.2d at 209. Even if that court had addressed the issue, it is clearly distinguishable from the factual basis of the plaintiff's claim in this case.

The plaintiff fails to discuss applicable law. The preclusive effect of an arbitration award that has not been confirmed by a court is determined by the applicable state law. *Wolf v. Gruntal & Co.*, 45 F.3d 524, 527 n. 3 (1st Cir. 1995). The collective bargaining agreement, a copy of which is Exhibit 3 to the plaintiff's deposition, does not specify any state law that the parties agree will be applicable to its terms. Since the collective bargaining agreement was apparently negotiated and executed in Maine and governs events that take place only in Maine, Maine law should apply. However, there is apparently no Maine law on this issue, and my research has unearthed no reported decision of the Maine Law Court sufficiently similar on its facts to allow the drawing of a reasonable inference about what that court's position would likely be. The plaintiff chose to bring his claim in a federal court; the FMLA explicitly provides that such claims may be brought in state court. 29 U.S.C. § 2617(a)(2). The plaintiff cannot now expect this court to blaze new trails in state law in the absence of any "well-plotted road map showing an avenue of relief that the state's highest court would likely follow." *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 744 (1st Cir. 1990).[8]

[8] While *Ryan* and its progeny, *e.g.*, *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1186-87 (1st Cir. 1996), base this principle in part on the fact that the proceedings involved were brought by invoking the federal court's diversity jurisdiction, and the instant case is based on federal question jurisdiction, that facts that the federal statute at issue provides for state-court jurisdiction and that the plaintiff invokes a state common-law doctrine in order to assert his eligibility for relief under the federal statute make this line of cases applicable in this case as well.

Accordingly, the plaintiff has failed to establish his eligibility under the FMLA and his motion for summary judgment on this claim must be denied. Unfortunately, given the facially appealing nature of his contention that the only reason he is not eligible for FMLA protection is that the defendant wrongfully prevented him from working sufficient hours in the relevant time period, this failure of argument requires, as a matter of law, that the defendant's motion for summary judgment be granted due to a failure of proof on the first element of the *Watkins* test.

This outcome makes it unnecessary to consider the defendant's two alternative arguments with respect to the plaintiff's FMLA eligibility. However, because an analysis of those arguments may be useful in further proceedings, I will address them here briefly. First, the defendant contends that the plaintiff does not qualify for FMLA protection because he provided no care for his father on the day in question but rather that he "just [hung] out" in his father's hospital room. Defendant's Motion at 3-4. The plaintiff points to 29 C.F.R. § 825.116, which implements 29 U.S.C. § 2613(b)(4)(A), which defines sufficient certification when an employer requires certification to support a request for leave under 29 U.S.C. § 2612(a)(1)(C), the statutory section upon which the defendant bases its argument. That regulation states that the term "needed to care for" in section 2613(b)(4)(A) (certification shall be sufficient if it states that the employee "is needed to care for" a parent) "includes providing psychological comfort and reassurance which would be beneficial to a . . . parent with a serious health condition who is receiving inpatient . . . care." 29 C.F.R. § 825.116. The record evidence does not rule out the possibility that the plaintiff was providing such comfort and reassurance to his father on the day in question. Indeed, the record includes the affidavit of the plaintiff's father stating that the plaintiff's visits while he was hospitalized "were very comforting and reassuring." Affidavit of Leland Plumley (Docket No. 36) ¶ 5. The defendant would not be entitled to summary judgment on this basis.

The defendant's second alternative argument is that the plaintiff failed to give proper notice under 29 U.S.C. § 2612(e) that he was taking October 13 off in order to care for his father. Defendant's Motion at 4-5. Recognizing that the plaintiff could not in any event have provided the 30 days' notice required in circumstances where the necessity for leave is foreseeable,[9] *see Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1208 (11th Cir. 2001), the defendant contends that the plaintiff did not provide it with notice sufficient to make it aware that his absence was due to a reason that potentially qualified for FMLA protection, *id*. at 1208-09. The defendant bases its argument on the plaintiff's deposition testimony that when he called the defendant on October 14 he remembered saying, "[T]here's problems with my dad. I'm going to see him." Defendant's SMF ¶ 34. This statement, the defendant contends, does not refer to the plaintiff's father's health and so is insufficient. Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply") (Docket No. 49) at 8. In response, the plaintiff relies on the statement in his affidavit to the effect that when he called in he "left a message explaining that I was going to Boston to see my father who had a serious illness and was hospitalized." Plaintiff's Aff. ¶ 10. The defendant responds that this statement "is in direct conflict with both his deposition testimony and written records created contemporaneously with this incident." Defendant's Reply at 8. To the extent that this response may be taken as a request to strike the relevant portion of the affidavit due to contradiction of earlier deposition testimony, no such contradiction is apparent. The plaintiff's affidavit does not necessarily impeach his deposition testimony. *See generally Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). To the extent that the written records to which the defendant refers do not refer to the plaintiff's father's illness, that evidence goes to the weight of the plaintiff's testimony. It does not make that testimony inadmissible. Accordingly, the defendant

[9] The plaintiff's father was admitted to the hospital only on October 4. Defendant's SMF ¶ 29.

would not be entitled to summary judgment on the basis of the alleged insufficiency of the notice provided by the plaintiff under the FMLA.

3. Count I — LMRA. The defendant contends that the plaintiff's LMRA claim is untimely and that he has failed to adduce any evidence that the Union breached its duty of fair representation, a necessary predicate to his direct claim under the statute. Defendant's Motion at 9-18. The plaintiff contends that the defendant's termination of his employment breached the collective bargaining agreement and that he may bring this claim directly because he has produced evidence that the Union breached its duty of fair representation by failing to pursue his grievance on this issue. Plaintiff's Motion at 9-11. In response to the defendant's timeliness argument, the plaintiff asserts that the Union concealed the fact that it had not proceeded with his grievance until November 1999, making this action timely. Plaintiff's Opposition at 21-22.

Ordinarily, a plaintiff who is covered by a collective bargaining agreement may not sue his employer for breach of that agreement until he has exhausted the grievance procedure provided by the agreement. *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). Here, the plaintiff submitted a grievance in connection with his termination, Plaintiff's SMF ¶ 12; Defendant's Opposing SMF ¶ 12, but the union did not submit the grievance to arbitration, Defendant's SMF ¶ 25, which was the next step contemplated by the collective bargaining agreement. Thus, the grievance procedure was not exhausted. An exception to the exhaustion requirement exists where the employee alleges that the union has breached its duty of fair representation in connection with his claim.

> [T]he wrongfully discharged employee may bring an action against his employer in the fact of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Vaca, 386 U.S. at 186. The plaintiff has alleged such a breach. Revised Second Amended Complaint ¶ 10.

i. Statute of Limitations

Claims of breach of a collective bargaining agreement that require proof of a breach of a union's duty of fair representation are subject to a six-month statute of limitations. *Graham v. Bay State Gas Co.*, 779 F.2d 93, 94 (1st Cir. 1985). The cause of action "arises when the plaintiff knows, or reasonably should know, of the acts constituting the union's alleged wrongdoing." *Id*. Here, the defendant contends that the plaintiff "lacks any explanation for the nineteen (19) month delay" between his termination and the filing of this action. Defendant's Motion at 15. Of course, a grievance was filed in this case, on or about October 15, 1998, Defendant's SMF ¶ 23, and the appropriate date on which to begin to apply the limitations period is not the date of the plaintiff's termination. If there were no other evidence, the period would run from the expiration of the five-day period for requesting arbitration established by Article XVI of the collective bargaining agreement, Defendant's SMF ¶ 35.[10] No such date is specified in the summary judgment record, but it is obvious that the date would be much more than six months before this action was filed.

However, the plaintiff has provided additional evidence which he uses to support an argument that he neither knew nor reasonably should have known until November 11, 1999 that the Union failed to request arbitration of his grievance, because the Union concealed that information from him. Plaintiff's Opposition at 21-22; Plaintiff's SMF ¶ 13, Defendant's Opposing SMF ¶ 13; Supplemental Affidavit [of John Plumley] in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's

[10] The Union's alleged failure to request arbitration is the only relevant breach of its duty of fair representation for purposes of this claim. The plaintiff's opposition to the defendant's motion for summary judgment takes the position that the Union's alleged cover-up of its failure to meet the contractual deadline was itself a breach of the relevant duty, Plaintiff's Opposition at 23, but those events did not themselves prevent the grievance from proceeding through the contractual grievance process. Only the failure to request arbitration in a timely manner had that effect.

Supplemental Aff.") (Docket No. 40) ¶¶ 6-10. Specifically, the plaintiff alleges that he repeatedly tried to get information from the Union about the status of his grievance but was told only that the Union was working on it and later that the Union had lost the paperwork but was working on it. Plaintiff's Supplemental Aff. ¶¶ 6-7. In August 1999 the Union local merged into another local. *Id*. ¶ 9. On November 11, 1999 the plaintiff was informed by Lestage that a timely request for arbitration had not been filed on his grievance. *Id*.

The defendant contends that the plaintiff should have known of any breach by the Union of its duty of fair representation by failing to seek arbitration in a timely manner due to the passage of time, given his familiarity with the collective bargaining agreement and the passage of time. Defendant's Opposition at 15-16.[11] In *Matter v. Bethlehem Steel Corp*., 797 F. Supp. 441 (W.D. Pa. 1992), the court held that, given the short time limits set forth in the collective bargaining agreement for initiating each step in the grievance procedure, the plaintiff should have become aware that the union was not pursuing his grievance at some point prior to the six month limitations period, *id*. at 445-46. Under the circumstances, the plaintiff "should have realized that the time limits set forth in the Agreement had expired and should then have made appropriate inquiries." *Id*. at 446. Because the plaintiff did not do so, the court found that the statutory limitations period had expired and dismissed his claim. *Id*.

The difference here is that the plaintiff offers his own testimony that he made appropriate inquiries and was affirmatively misled by the Union. In the absence of any evidence to the effect that arbitrations were always held on all grievances filed at the defendant's Westbrook plant within a period significantly shorter than the thirteen months that elapsed before the plaintiff alleges that he was

[11] The defendant also contends that the plaintiff's proffered evidence concerning what he was told by individuals he identifies only as "union personnel," Plaintiff's Supplemental Aff. ¶ 7, is inadmissible hearsay and thus may not be considered in connection with this motion, Defendant's Opposition at 15. However, the plaintiff does not offer what he reports that these individuals said to him for the truth of the matter asserted; indeed, he plainly offers their statements to him as lies. He offers this information as evidence of his reasonable lack of knowledge and accordingly it is not hearsay. F. R. Evid. 801(c).

informed about the true state of affairs and that the plaintiff was aware of this fact, this testimony is sufficient to avoid the entry of summary judgment on the basis that he should have been aware of the Union's alleged breach of its duty to him. The defendant does not offer any evidence that suggests that the plaintiff had actual knowledge of this alleged breach.

ii. Breach of the Union's Duty

The defendant argues that the plaintiff has submitted nothing more than "speculation or surmise" as evidence to support his claim that the union breached its duty of fair representation. Defendant's Opposition at 11. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190. Here, the plaintiff contends only that the Union's conduct was arbitrary. Plaintiff's Motion at 10-11; Plaintiff's Opposition at 19-20, 22. Indeed, there is little or no evidence in the summary judgment record that would allow a reasonable factfinder to characterize the Union's alleged conduct as discriminatory or in bad faith.

> To survive a motion for summary judgment, a plaintiff alleging a breach of the duty of fair representation must set forth concrete, specific facts from which one can infer a union's hostility, discrimination, bad faith, dishonesty or arbitrary exercise of discretion.

Gold v. Local Union No. 888, U.F.C.W., A.F.L.-C.I.O, 758 F. Supp. 205, 208 (S.D. N.Y. 1991) (internal quotation marks and citation omitted).

> While arbitrary conduct is a breach of a union's duty, the test for determining whether particular conduct is arbitrary can be quite forgiving. Courts should not substitute their judgment for that of the union, even if, with the benefit of hindsight, it appears that the union could have made a better call. Thus, a union's actions are considered arbitrary only if in light of the factual and legal landscape, these actions are so far outside a wide range of reasonableness as to be irrational. . . . [O]nly an egregious disregard for union members' rights constitutes a breach of the union's duty. What is required to be shown goes considerably beyond the requirements of a malpractice suit.

Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995) (internal punctuation and citations omitted). "The grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). The mere failure to take the dispute to arbitration does not in itself establish liability. *Vaca*, 386 U.S. at 191-95. The processing of a meritorious grievance in a perfunctory manner "may be a violation of the duty of fair representation." *Sarnelli v. Amalgamated Meat Cutters & Butcher Workmen of N. A.*, 457 F.2d 807, 808 (1st Cir. 1972). *Cf. Boggess v. Heritage Cadillac, Inc.*, 687 F. Supp. 417, 422 (N.D. Ill. 1988) ("Mere negligence on the part of the union, or perfunctory handling of a possibly meritorious grievance, is not sufficient misconduct to support an action for breach of duty of fair representation. *Grant v. Burlington Industries*, 832 F.2d 76, 79 (7th Cir. 1987)."); *Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970) (negligence or poor judgment not enough).

The defendant cites *Giordano v. Local 804, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 634 F. Supp. 953 (S.D. N.Y. 1986), in which the court held that failure to file a timely request to proceed to arbitration was not sufficiently arbitrary to constitute a breach of the union's duty of fair representation, but in that case the court found that the union "acted in good faith and reasonable reliance on past practice," because the employer had never previously invoked the filing deadline established by the collective bargaining agreement, *id*. at 956. There is no evidence of such a past practice in this case. The evidence submitted by the plaintiff in this case must be evaluated in light of the First Circuit's "perfunctory manner" standard, and its reliance in *Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281, 284 (1st Cir. 1970), on the absence of evidence that the union "ever . . . made any judgment concerning the merits of [the plaintiff's] grievance." A considered decision not to proceed to arbitration based on a judgment that

the grievance lacks merit, even if erroneous, does not constitute a breach of the duty of fair representation. *Bazarte*, 429 F.2d at 872.

In order to show that his grievance was meritorious, the plaintiff offers his FMLA claim and an assertion that his absence on October 13, 1998 would not have resulted in enough "points" to allow the defendant to discharge him under the terms of the collective bargaining agreement. Plaintiff's Motion at 9-10; Plaintiff's Opposition at 18-19. As discussed above, the plaintiff has failed to establish that he was eligible for FMLA protection. The defendant disputes the plaintiff's analysis of his "points" status at the time of termination, Defendant's Reply at 9-10, but it is impossible to evaluate this argument based on the evidence appropriately presented by the parties in their statements of material facts. Significantly, the plaintiff offers nothing about how many "points" he had been assessed prior to the first grievance and reinstatement, whether any of those "points" carried over after the reinstatement, how many "points" would justify termination, or how many "points" he had been assessed as a result of leaving early on October 12 and failing to report for work on October 13. The plaintiff's only attempt to provide factual support on this issue appears in his "supplemental" statement of material facts, which may not be considered by the court. *See* n. 1, *supra*. Even if that document had been properly presented, the factual presentation on this point is insufficient. Plaintiff's Supplemental Statement of Material Facts re Motion for Summary Judgment ¶7. Accordingly, because the plaintiff has failed to submit evidence that would allow a reasonable factfinder to conclude that the grievance allegedly abandoned by the Union was meritorious, he cannot prove that the Union breached its duty of fair representation, and the defendant is entitled to summary judgment on the LMRA claim.

In addition to this failure, the plaintiff's submissions do not provide concrete, specific facts that would allow the factfinder to draw a reasonable inference of arbitrary action in other respects. In support of his position, the plaintiff offers paragraphs 12-14 of his own affidavit, paragraphs 6-10 of

his supplemental affidavit, paragraph 6 of the Landry affidavit, paragraphs 5-13 of the Lestage affidavit, pages 7-8, 23-40, 54 & 62 of the Parenteau deposition, Exhibit 3 to the Parenteau deposition and Exhibit 19 to his own deposition. Plaintiff's SMF ¶¶ 13-15; Plaintiff's Additional SMF ¶¶ 17-20.

Paragraph 12 of the plaintiff's affidavit provides no support for an allegation of breach by the Union. Paragraph 14 merely states the plaintiff's belief that the Union "failed in its representation of me," which is a conclusion rather than a statement of fact that would allow the drawing of such a conclusion. *See Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996) (court need not accept bald assertions and unsupportable conclusions in connection with a motion for summary judgment). Paragraph 13 is also phrased in conclusory terms (the union "arbitrarily abandoned my grievance") and, while it establishes that a request for arbitration was not filed within the time limits, it does not suggest any untoward reason for this conduct.

Paragraphs 6-10 of the plaintiff's supplemental affidavit primarily address the Union's alleged attempts to conceal from the plaintiff its failure to request arbitration of his grievance. This material, and the material in those paragraphs that repeats the information in paragraphs 12-14 of the plaintiff's initial affidavit, does nothing to support the claim of breach based on arbitrariness.

Paragraph 6 of the Landry affidavit states Landry's intent with regard to the wording on the written grievance that was prepared on October 14, 1998 and has no relationship to the Union's failure to request arbitration of that grievance.

Paragraphs 5-13 of the Lestage affidavit merely establish the circumstances under which the affiant became aware of the existence of the plaintiff's grievance, the fact that arbitration of that grievance had not been requested in a timely fashion and the Union's subsequent formal decision not to proceed with the grievance given that omission. Nothing in these paragraphs could support a conclusion that the failure to make a timely request was itself arbitrary.

Pages 7-8 of the Parenteau deposition merely establish that the plaintiff's grievance was filed on or about October 15, 1998. Pages 23-40 of this deposition, together with Exhibit 3, establish that Parenteau informed the president of the Union on or about October 21, 1998 that the time limits had been exceeded for Step 3 of the plaintiff's grievance; that Parenteau created certain documents regarding the plaintiff's earlier grievance that resulted in his reinstatement; that the arbitrator ordered the plaintiff's reinstatement as a result of that grievance; the circumstances surrounding the plaintiff's return to work; Parenteau's knowledge concerning the relevant events of October 12 and 13, 1998; and Parenteau's memorandum concerning his termination of the plaintiff's employment on October 14, 1998. Page 54 of the deposition establishes that Parenteau has "information on whether there were a number of grievances filed by Local 669 which were not pursued to a timely conclusion ant thus were not eligible for arbitration." Page 62 establishes that the Union did not serve a notice of arbitration with respect to the plaintiff's October 15, 1998 grievance. None of this material establishes anything of relevance to the allegation that the Union breached its duty other than the fact, already established, that it failed to file a timely request for arbitration (Step 3).

Finally, Exhibit 19 to the plaintiff's deposition is a letter from William B. Carver, a Union representative, to Peter C. Buhler of the American Arbitration Association seeking his assistance in working out the amount of back pay due to the plaintiff as a result of the arbitration award reinstating him after the earlier grievance. Its possible relevance to a claim of breach of the duty of fair representation with respect to the failure to seek arbitration of the later grievance is not apparent and is not explained by the plaintiff.

Essentially, the plaintiff's submissions require a factfinder to infer a breach of the duty of fair representation merely from the fact that the Union did not present a timely request for arbitration of his grievance. The case law discussed above does not support such an evidentiary leap. Under the First

Circuit's standard, the plaintiff has failed to provide evidence that would allow a reasonable factfinder to conclude that the failure in this case resulted from treatment of the plaintiff's grievance in a perfunctory manner. To so conclude on this record would be to engage in unwarranted speculation.

V. Conclusion

For the foregoing reasons, the plaintiff's motion to strike is **DENIED**. I also recommend that the defendant's motion for summary judgment be **GRANTED** and the plaintiff's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of October, 2001.

David M. Cohen
United States Magistrate Judge

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